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# A Return to Written Consent: A Proposal to the FCC to Eliminate Slamming

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# NOTE

## A Return to Written Consent: A Proposal to the FCC to Eliminate Slamming

Nicole C. Daniel\*

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If the free enterprise system is to survive, competition must be free as well as fair. Honest competitors must be protected from predators and shielded from the temptation to adopt the tactics of tricksters in the battle for business survival. And consumers must be protected against commercial chicanery, because fairness requires that they receive an honest product honestly represented, and because consumers are citizens and will ultimately determine the degree of control that government will exercise over business.<sup>1</sup>

## INTRODUCTION

"Slamming,"<sup>2</sup> the unauthorized conversion of a customer's long-distance carrier by another carrier, is currently the number one consumer complaint at the FCC's Common Carrier Bureau.<sup>3</sup> As interexchange carriers (IXCs)<sup>4</sup> such as AT&T, MCI, Sprint, and other lesser known companies fight for market share,<sup>5</sup> they often take unfair advantage of their deregulated freedom. Instead of competing fairly with one another by offering the best service to the consumer, many switch the consumer's long-distance

1. EARL W. KINTNER, AN ANTITRUST PRIMER at xiv (1964).

2. Slamming is defined as "the unauthorized conversion of a customer's interexchange carrier by another interexchange carrier, interexchange resale carrier, or a subcontracted telemarketer." *In re Cherry Comm., Inc., Consent Decree*, 9 FCC Rcd. 2086, para. 4, 75 Rad. Reg. 2d (P & F) 268 (1994). One source suggests the word slamming derived from a practice in the telemarketing industry whereby a telemarketer called a customer to switch his line, and after the customer refused, the telemarketer slammed down the phone, followed by the comment, "sounds like they want to change." David Hayes, *Sorry, You've Been Slammed; Phone Bills Bring Surprise*, KAN. CITY STAR, Sept. 16, 1996, at A1.

3. Michael G. Wagner, *Long Distance Phone Customers Being 'Slammed'*, L.A. TIMES, Sept. 1, 1996, at A1.

4. The term interexchange carrier (IXC) refers to telephone companies that transport long-distance service. In contrast, a local exchange carrier (LEC) transports primarily local exchange service. This Note focuses on the competition between the IXCs rather than that between the LECs.

5. For a report summarizing publicly available data on long-distance shares, *See FCC Releases Report on Long Distance Market*, Sept. 27, 1996, available in 1996 FCC LEXIS 5361. This report can also be downloaded from the FCC-State link internet site, via a link from the Common Carrier Bureau home page <<http://www.fcc.gov/ccb.html>>. Table 4 lists 1995 data for presubscribed telephone lines by carrier as follows: AT&T 101,188,792; MCI 23,911,437; Sprint 9,784,388; LDDS 4,088,816.

carrier without their express approval.<sup>6</sup> Some long-distance carriers hold contests or send promotional checks to gain the consumer's "authorization." Others have gone so far as to forge signatures authorizing a change in service.

Although slamming can occur in many forms, the root of this problem lies in weak rules and lack of enforcement. When consumers have their phone service changed by being tricked into signing authorization cards or by simply doing nothing, it is clear that the rules are not working.

On February 8, 1996, the Telecommunications Act of 1996 (Act) became law,<sup>7</sup> declaring slamming illegal.<sup>8</sup> A key provision of the Act also eliminates legal and regulatory barriers in the local exchange market allowing competition similar to that in the long-distance market.<sup>9</sup> Just as long distance carriers are able to compete against one another for market share, the Act opens the doors of competition to local exchange carriers, heightening the potential for slamming.<sup>10</sup>

With the passage of this law, Congress directed the Federal Communications Commission (FCC or Commission) to promulgate rules implementing the policies embodied in the Act. Consequently, the Commission

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6. Slamming can occur by mistake, and not all of these companies purposefully engage in this practice.

7. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified in scattered sections of 47 U.S.C.).

8. SEC. 258 ILLEGAL CHANGES IN SUBSCRIBER CARRIER SELECTIONS:

(a) Prohibition. No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange services or telephone toll service except in accordance with the verification procedures as the Commission shall prescribe. Nothing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate services.

(b) Liability for charges. Any telecommunications carrier that violates the verification procedures described in subsection (a) of this section and that collects charges for telephone exchange service or telephone toll service from a subscriber shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation, in accordance with such procedures as the Commission may prescribe. The remedies provided by this subsection are in addition to any other remedies available by law.

Telecommunications Act, sec. 101, § 258, 110 Stat. at 77.

9. Telecommunications Act, sec. 101, § 251, 110 Stat. at 61-66. The Telecommunications Act promises a "procompetitive, deregulatory national framework to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." S. CONF. REP. NO. 104-230, at 1 (1996).

10. The Act defines "local exchange carrier" as "any person that is engaged in the provision of telephone exchange service or exchange access." Telecommunications Act, sec. 3, § 153(44), 110 Stat. at 59. "Telephone exchange service" is a statutory term of art meaning service within discrete local exchange markets. *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1045 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

is currently faced with the task of encouraging competition in the telecommunications industry, while ensuring that competition remains both "free and fair."<sup>11</sup> Both the Commission and the industry want to deregulate the market to encourage competition and innovation, but the FCC must also ensure that the consequences of deregulation do not unfairly skew the marketplace.

As the FCC evaluates new rules to regulate and deter this practice, it is important to remember how competition and the free-market work. Consumers must be able to freely choose their carrier without deception or misleading gimmicks.<sup>12</sup> In addition, businesses must be able to compete against one another in a fair way—this cannot occur when companies steal each other's customers in an uncompetitive manner. The best way to prevent this is to put an end to the games these phone companies play and return the freedom to choose to the consumer.

Part I of this Note provides insight into the problem of slamming and gives examples of how slamming works. Part II discusses the relevant regulatory powers of the FCC. Part III examines the origins of slamming. Part IV examines recent actions that the FCC has taken to put an end to slamming. Finally, part V analyzes the weaknesses in the FCC rulings and responses, and makes recommendations for reform.

This Note's primary recommendation is to reinstate the short-lived FCC rule requiring written authorization from the consumer before any change in the long-distance carrier could be implemented.<sup>13</sup> This rule is clear and simple, helps to ensure that all customers retain control over their phone service, and promotes the public interest by allowing the customer to truly benefit from competition. In addition, this rule must be enforced, and those who violate the rule should suffer stiffer penalties to discourage such behavior.

Although this Note analyzes only the federal response to the issue of slamming and does not discuss state actions to curb this deceitful practice, the findings are equally applicable at all levels. Now that local telecommu-

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11. The phrase "free and fair" is used throughout this paper in reference to Kintner's quote regarding competition and the free enterprise system. See text accompanying *supra* note 1. It also refers to the prohibition against unfair competition as embodied in the antitrust statutes. This theory is developed in a later part of this Note.

12. This statement refers to the FTC Act, stating that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1) (1995).

13. *In re Investigation of Access and Divestiture Related Tariffs*, Memorandum Opinion and Order, 101 F.C.C.2d 911, app. B, para. 11, 58 Rad. Reg. 2d (P & F) 337 (1985) [hereinafter *Allocation Order*].

nications carriers are free to compete,<sup>14</sup> slamming will potentially be an even greater problem,<sup>15</sup> and sound, clear rules are necessary to ensure fair competition and to safeguard both consumers and the telephone companies.

### I. SLAMMING

In 1994, the FCC logged 3301 slamming complaints, up from 1817 the previous year.<sup>16</sup> By July 1995, monthly complaints were up threefold from the previous year.<sup>17</sup> The year ended with the FCC logging more than 10,000 slamming complaints.<sup>18</sup> Some reports suggest the problem costs consumers as much as \$100 million each year.<sup>19</sup> Reed Hundt, chairman of the FCC, stated "[t]he upsurge in slamming is a 1995 issue,"<sup>20</sup> and it continues to be a problem today. "It's the kind of unfair, even fraudulent, development that unfortunately can come with the emergence of a competitive market. . . . We could well see the start-up of slamming programs with respect to the local exchange market."<sup>21</sup> Although many consumers believe that they are immune from slamming because they scrutinize the fine print on all contests and promotional checks, they can nevertheless be slammed without doing a thing.

Joyce Williams, a medical records administrator from Washington, D.C., opened her phone bill one month in 1994 and discovered that AT&T was no longer her long-distance provider. Rather, Home Owners Long Distance, Inc. had taken over her service. Williams eventually traced the switch to her seventeen-year-old son who had signed a card at a shopping mall in support of finding missing children. However, the card was merely a part of Home Owners' promotions and in very fine print contained an authorization to switch the household's long-distance carrier.<sup>22</sup>

Edward Baig received a phone call from AT&T asking if he wanted to reinstate AT&T as his long-distance carrier. The irony of this call is that

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14. Telecommunications Act, sec. 101, § 251, 110 Stat. at 61-66.

15. See generally Craig D. Dingwall, *The Last Mile: A Race for Local Telecommunications Competition Policy*, 48 FED. COMM. L.J. 105 (1995).

16. Elizabeth Corcoran & Mike Mills, *Long Distance: When the 'Slam' Isn't So Grand*, WASH. POST, Mar. 4, 1995, at D1, D7.

17. Gautam Naik, *'Slamming' Scourge: Stealing of Customers Spreads With Resellers of Telephone Service*, WALL ST. J., July 26, 1995, at A1.

18. Henry Gilgoff, *It's Your Money, More Than Just a Contest: Stop a Slammer With a Freeze*, NEWSDAY, Apr. 28, 1996, at F3.

19. Naik, *supra* note 17.

20. *Id.*

21. *Hearing of the Senate Commerce, Science and Transportation Committee on FCC Oversight*, FED. DOC. CLEARING HOUSE CONG. TEST., June 18, 1996, available in LEXIS, Legis Library, Cngst File (statement of Reed E. Hundt).

22. Corcoran & Mills, *supra* note 16.

he did not even know that he had left AT&T in the first place. When his phone bill arrived a few days later, it contained a statement from Sonic Communications, an unfamiliar company name of which he had never heard. To make matters worse, the bill came to a grand total of \$104.42 for eight calls between Manhattan and Silver Spring, Maryland. Under his AT&T plan these same calls would have cost only \$29.66.<sup>23</sup>

Two California residents had their service switched from AT&T to Excel Telecommunications. Upon investigation, they learned that the letters of agency used to switch their service contained forged signatures and fabricated social security numbers.<sup>24</sup>

In Westport, Connecticut, the town hall was slammed. When MCI's logo suddenly appeared atop the phone bill for Westport's municipal offices, the town realized it had become a victim as well. Of course, MCI apologized to the town and agreed to investigate the mistake.<sup>25</sup>

Although slamming is currently a "hot" issue that concerns consumers, legislators and industry, it is not a new phenomenon. In early 1990, AT&T sued MCI over deceptive marketing practices—including slamming—alleging that it was losing customers by the thousands to this practice.<sup>26</sup> Since then, the FCC has promulgated numerous rules in an effort to stop slamming. The most recent rule took effect September 11, 1995, and placed restrictions on how a carrier can market its product to consumers.<sup>27</sup>

Five days after the newest FCC rule on slamming went into effect, Robert Stokem of Colorado was slammed by Brittan Communication International (BCI) when he entered a raffle for a car. When he signed the raffle card, he did not realize that he was also signing a letter of authorization to switch his long-distance carrier. Although BCI followed the FCC's newest rules, another consumer felt deceived and cheated. "The FCC attorney in charge of carrier enforcement said the BCI card may [have met] the letter of the law but violate[d] the spirit of the rules."<sup>28</sup>

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23. Edward Baig, *Shady Operators in Long Distance?*, BUS. WK., Apr. 24, 1995, at 138.

24. *In re Excel Telecommunications, Inc., Notice of Forfeiture*, 1996 WL 399981 (F.C.C. June 21, 1996).

25. *Westport: The Town That Was Slammed*, HARTFORD COURANT, Aug. 19, 1995, at A8.

26. *American Tel. & Tel. v. MCI Communications Corp.*, 736 F. Supp. 1294 (D.N.J. 1990). See also Mark Lewyn, *Watchdogs Could Lower the Boom on Phone-Company 'Slamming'*, BUS. WK., Nov. 12, 1990, at 55.

27. *In re Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Report and Order*, 10 FCC Rcd. 9560, 78 Rad. Reg. 2d (P & F) 215 (1995) [hereinafter *LOA Order*].

28. Kerri Smith, *Bad Connection: When You Enter a Raffle for a Car and Get a New Long-Distance Carrier, You've Been Slammed*, ROCKY MTN. NEWS, Dec. 4, 1995, at 36A.

## II. THE FCC'S POWERS TO REGULATE SLAMMING

### A. *The Federal Communications Act of 1934*

The Communications Act of 1934,<sup>29</sup> as most recently amended in 1996, governs national telecommunications policy.<sup>30</sup> Pursuant to the 1934 Act, the Commission maintains regulatory power over interstate and foreign commerce in communication by wire and radio.<sup>31</sup> The core principle of the 1934 Act requires the FCC to consider "the public interest, convenience and necessity" when establishing rules.<sup>32</sup> All rules and regulations promulgated by the FCC have the effect of law, so long as they are consistent with the Act.<sup>33</sup>

The FCC has two general sets of functions.<sup>34</sup> First, it must establish and enforce fair rules of competition in communications. Second, it must "work in the public interest to protect consumers in noncompetitive telecommunications markets and to guarantee public benefits from communications that a market system simply will not provide. This is the FCC that . . . guards against ripoffs in long distance by issuing sanctions against slamming."<sup>35</sup>

### B. *The FTC Act*

Although the FCC does not have the power to enforce antitrust laws, it is permitted to take antitrust policies into account when establishing rules.<sup>36</sup> One of the key antitrust statutes designed to protect consumers from unfair trade practices is the Federal Trade Commission Act, Section 5 (FTC Act).<sup>37</sup> This section broadly prohibits "unfair methods of competi-

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29. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

30. *Benanti v. United States*, 355 U.S. 96 (1957) (holding the Communications Act of 1934 is a comprehensive scheme for regulation of interstate communications).

31. 47 U.S.C. § 151 (1995). *See also, In re Establishment of Interstate Toll Settlements, Memorandum Opinion and Order*, 93 F.C.C.2d 1287, para. 15, 53 Rad. Reg. 2d (P & F) 1647 (1983) (stating that the major objective of the Communications Act is to grant the Commission sufficient authority to insure that regulatory policies relating to common carrier services be developed in a uniform and consistent manner).

32. 47 U.S.C. §§ 251(h)(3), 302(a), 303, and 309(a) (1995).

33. *Red River Brdest. Co. v. FCC*, 98 F.2d 282, 285 (D.C. Cir. 1938), *cert. denied*, 305 U.S. 625 (1939).

34. *Reform of the Federal Communications Commission: Hearings Before the Subcomm. on Telecommunications and Finance of the Committee on Commerce House of Representatives*, 104th Cong. 15 (1996) (statement of Reed E. Hundt).

35. *Id.*

36. *FCC v. Nat'l. Citizens Comm. for Brdest.*, 436 U.S. 775 (1978).

37. 15 U.S.C. § 45 (1995).



tion in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."<sup>38</sup> The FTC Act defines a practice or act as unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."<sup>39</sup> When analyzing whether an act or practice is unfair, the FTC may consider the following factors: first, whether the practice offends public policy as established by statutes, common law, or otherwise; second, whether it is immoral, unethical or oppressive, or unscrupulous; and third, whether it causes substantial injury to consumers or competitors.<sup>40</sup>

It is clear that slamming meets all three of these criteria, and would be considered an "unfair practice." However, common carriers subject to the Communications Act are exempt from the FTC Act.<sup>41</sup> Subsequently, other than state enforcement of unfair intrastate acts, the FCC is the only agency with the power to stop slamming by establishing rules and monitoring unfair practices among the telephone companies.

### III. THE RISE IN COMPETITION AND ORIGINS OF SLAMMING

#### A. *The Entry of New Competitors*

Most discussions regarding the rise in competition in the long-distance telephone market begin with the break up of AT&T.<sup>42</sup> However, the seeds of competition were sown long before this antitrust settlement. When the Communications Act of 1934 was signed into law, the telephone industry was accepted as a natural monopoly.<sup>43</sup> However, new developments and innovations enabled others to slowly enter the market. Microwave

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38. 15 U.S.C. § 45(a)(1).

39. 15 U.S.C. § 45(n).

40. *In re Pfizer, Inc., Order, Opinion, Etc. in Regard to the Alleged Violation of Section 5 of the Federal Trade Commission Act*, 81 F.T.C. 23 (1972).

41. 15 U.S.C. § 45(a)(2) exempts "common carriers subject to the Acts to regulate commerce" from the Commission's powers. 15 U.S.C. § 44 defines "[a]cts to regulate commerce" as "the Act entitled 'An act to regulate commerce,' approved February 14, 1887, and all Acts amendatory thereof and supplementary thereto and the Communications Act of 1934 and all Acts amendatory thereof and supplementary thereto."

42. For more concerning the history of the divestiture action, see STEVE COLL, *THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T* (1986); ROBERT W. CRANDALL, *AFTER THE BREAKUP* (1991); PETER TEMIN, *THE FALL OF THE BELL SYSTEM* (1987).

43. MICHAEL K. KELLOGG ET AL., *FEDERAL TELECOMMUNICATIONS LAW* (1992); see also DANIEL L. BRENNER, *LAW AND REGULATION OF COMMON CARRIERS IN THE COMMUNICATIONS INDUSTRY* (1992); GERALD R. FAULHABER, *TELECOMMUNICATIONS IN TURMOIL* (1987).

developments made during World War II<sup>44</sup> brought about a new technology for communications. In 1959, the FCC allocated spectrum to private microwave users,<sup>45</sup> enabling them to bypass the long-distance network for their own private end-to-end connections.<sup>46</sup> This important decision signaled the beginning of the end of the monopoly.

In 1969, Microwave Communications, Inc. (MCI) gained approval by the FCC to provide limited microwave radio service.<sup>47</sup> Although there was a great deal of concern among existing carriers over the implications of this competitive move, the FCC granted MCI's petition. Commissioner Johnson, in a separate statement, reflected on the role of government in the competitive marketplace and asserted that he was looking "for ways to add a little salt and pepper of competition to the rather tasteless stew of regulatory protection that this Commission and Bell have cooked up."<sup>48</sup>

Once MCI broke ground in this previously monopolistic territory, the race officially began. MCI next petitioned to provide more than private line services through *Execunet*. Under this plan, a subscriber could reach any MCI serviced phone by dialing a series of special numbers.<sup>49</sup> This plan directly threatened the sanctity of AT&T. Although the FCC fought to prevent MCI's implementation of *Execunet*, the United States Court of Appeals for the District of Columbia Circuit approved the plan.<sup>50</sup>

As the case moved through the appellate process, the FCC reviewed a petition filed by AT&T and ruled that it had no obligation to furnish any specialized carrier with connections required by *Execunet*-type services.<sup>51</sup> This ruling, however, was trumped by the court in *Execunet II*.<sup>52</sup> By 1981, the court extended AT&T's obligation to provide interconnection services to all independent local exchange companies.<sup>53</sup>

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44. See generally GERALD BROCK, THE TELECOMMUNICATIONS INDUSTRY 180-87 (1981); KELLOGG, *supra* note 43, 588 n.7.

45. *In re Allocation of Frequencies in the Bands Above 890 Mc., Report and Order*, 27 F.C.C. 359, 18 Rad. Reg. (P & F) 1767 (1959).

46. KELLOGG, *supra* note 43, at 592.

47. *In Re MCI for Construction Permits to Establish New Facilities, Decision*, 18 F.C.C.2d 953, 16 Rad. Reg. 2d (P & F) 1037 (1969), *recon. denied*, 21 F.C.C.2d 190, 18 Rad. Reg. 2d (P & F) 226 (1970).

48. 18 F.C.C.2d at 976, 16 Rad. Reg. 2d (P & F) at 1067 (separate statement of Commissioner Nicholas Johnson).

49. *MCI Telecomm. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) [hereinafter *Execunet*].

50. *Id.*

51. *In re Petition of AT&T for a Declaratory Ruling and Expedited Relief, Memorandum Opinion and Order*, 67 F.C.C.2d 1455, 42 Rad. Reg. 2d (P & F) 789 (1978).

52. *MCI Telecomm. v. FCC*, 580 F.2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978) [hereinafter *Execunet II*].

53. *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981).

When the FCC realized that the doors to competition truly had been opened, the Commission began to explore ways of dealing with this competition. In its *Competitive Carrier Services Notice of Inquiry*,<sup>54</sup> the FCC proposed to modify its rules to reflect the changes that had occurred in the industry over the past decade. "[W]ith the emergence of many competitive telecommunications firms a new approach to reflect the nature of such firms would allow these companies and the overall telecommunications industry to satisfy consumer demands more effectively."<sup>55</sup> In this Notice, the Commission classified carriers as either dominant or non-dominant depending on their power to control price, and determined that it would employ regulatory regimes in light of this classification "as proper and warranted by the public interest."<sup>56</sup>

This set of decisions by the court and the FCC significantly eroded AT&T's monopoly power. MCI's strategic maneuvering broke the ground for others to follow suit and begin their competitive efforts against the industry giant, AT&T.

### B. *The Divestiture of the Bell System*

As the FCC and the courts worked out new rules allowing competition in the long-distance market, the Department of Justice filed an antitrust action against AT&T. The complaint alleged an unlawful monopolization of both long-distance service and the manufacture of telecommunications equipment.<sup>57</sup> Eight years after the action commenced, the parties settled.<sup>58</sup> In this settlement, known as the *Modification of Final Judgment (MFJ)*, the Court allowed AT&T to draft its own plan, subject to review, for the reorganization and divestiture.<sup>59</sup> The *MFJ* had four basic provisions.<sup>60</sup> First, it required AT&T to divest its local Bell Operating Companies (BOCs).<sup>61</sup> Although no specific number of regional BOCs was required, AT&T settled on seven (Ameritech, Bell Atlantic, BellSouth, Nynex, Pacific

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54. *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations, Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308 (1979).

55. *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations, First Report and Order*, 85 F.C.C.2d 1, para. 9, 52 Rad. Reg. 2d (P & F) 215 (1980) [hereinafter *Competitive Carrier Services Inquiry*].

56. *Id.*

57. KELLOGG, *supra* note 43, at 206.

58. *United States v. AT&T*, 552 F. Supp. 131 (D.C. Cir. 1982) [hereinafter *MFJ*], *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983).

59. KELLOGG, *supra* note 43, at 218.

60. *Id.* at 221.

61. *MFJ*, 552 F. Supp. at 227.

Telesis, Southwestern Bell, and US West).<sup>62</sup> Second, it required the BOCs to provide equal access to the local network to all long-distance carriers.<sup>63</sup> Third, it denied the BOCs the right to provide interexchange services or to manufacture telecommunications products.<sup>64</sup> Last, it disposed of the 1956 "Final Judgment" consent decree.<sup>65</sup>

Under this plan, the BOCs were to confine their telephone operations to "Local Access and Transport Areas" (LATAs).<sup>66</sup> Each BOC would provide "transport" among end users within a LATA and "access" to long-distance carriers. The BOCs were prohibited from providing interexchange telecommunications services.<sup>67</sup> Hence, this allowed the BOCs to operate within the local market, but they could not themselves provide the long-distance services.

The "equal access" requirement of the *MFJ* is in many respects the cornerstone of this agreement. The decree required the BOCs to provide "information access" and "exchange services for such access" to all interexchange carriers (IXCs) on equal terms.<sup>68</sup> The BOCs also could not discriminate between AT&T and other interexchange providers that utilized their services. This provision of the *MFJ* was key in stimulating competition in the long-distance market. These requirements gave MCI and other carriers access to the networks established by AT&T and allowed them to effectively compete for long-distance customers.

### C. Implementation of "Equal Access" Under the *MFJ*

Once the court decreed that the BOCs were to provide equal access to all IXCs, the FCC and the carriers had to work out the details for implementing this order. At the time of the *MFJ*, only AT&T could be accessed as the long-distance provider of choice unless consumers utilized a special code, adding as many as ten extra digits to their calls.<sup>69</sup> Since this was found to have a "significant negative impact on competition"<sup>70</sup> the

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62. Daniel F. Spulber, *Deregulating Telecommunications*, 12 YALE J. ON REG. 25, 27 (1995).

63. *MFJ*, 552 F. Supp. at 227.

64. *Id.*

65. *Id.* at 226.

66. KELLOGG, *supra* note 43, at 227. A "LATA" is "one or more contiguous local exchange areas serving common social, economic, and other purposes, even where such configuration transcends municipal or other local governmental boundaries."

67. *MFJ*, 552 F. Supp. at 227.

68. Equal access is defined as that which is "equal in type, quality, and price to that provided by AT&T and its affiliates." *Id.*

69. *United States v. Western Elec. Co., Inc.*, 578 F. Supp. 668 (D.C. Cir. 1983).

70. *MFJ*, 552 F. Supp. at 197.

*MFJ* opted for presubscription whereby consumers could pre-designate a primary interexchange carrier (PIC).

### 1. Allocation Order

The predesignation system worked well for those consumers who affirmatively chose their carrier. However, an issue arose as to the default plan for those consumers who failed to presubscribe. Under the *MFJ*, the local exchange carrier (LEC) could default all non-presubscribed calls to AT&T.<sup>71</sup> In its *Allocation Order*,<sup>72</sup> the FCC found this practice to be uncompetitive and unfair to other IXCs and implemented a uniform pro rata allocation plan.<sup>73</sup>

Under this plan, the LEC would mail to each customer a ballot to select the preferred carrier. Those who failed to affirmatively select a carrier would be assigned one based on a pro rata basis. This system allowed non-AT&T carriers greater access to customers and encouraged individual IXCs to market their plan and differentiate their services from AT&T. The Department of Justice supported this arrangement, stating:

In our opinion, a ballot/allocation procedure is more consistent with protecting the competitive process than default, which automatically assigns customers to only one competitor. By increasing the incentives of all ICs to provide helpful information to consumers, thereby facilitating the ability of customers to make rational, informed choices among the ICs, a ballot/allocation system promotes efficient functioning of the market.<sup>74</sup>

The policy choices mandated by the FCC in this order are clear. First, the FCC believed that the ballot/allocation plan would serve the public interest by increasing consumer awareness of the available services offered by the varying providers. Second, the plan gave the IXCs an incentive to offer competitive services to attract new customers. "*The most important aspect of this plan is that customers will be better able to exercise their right to choose a primary long distance carrier.*"<sup>75</sup>

As part of the allocation procedure, the Commission chose to allow two means for customer subscription other than the ballot. First, customers could contact the IXC to make arrangements for service. Second, IXCs could seek out customers to gain commitments to allow that IXC to become

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71. *Western Elec.*, 578 F. Supp. at 676 (D.C. Cir. 1983).

72. *Allocation Order*, 101 F.C.C.2d 911, 58 Rad. Reg. 2d (P & F) 337 (1985).

73. This plan applied to the BOCs under the *MFJ*, GTE pursuant to the Consent Decree, and independent telephone companies pursuant to Commission's Phase III Order. *See id.* para. 32.

74. *Id.* para. 21.

75. *Id.* para. 38 (emphasis added).

the customer's designated carrier. Under this second approach, the IXC was required to obtain a signed letter of agency (LOA)<sup>76</sup> from the customer, and then send a confirmation of the LOA to the LEC before the LEC could implement the designation of that carrier for that customer.<sup>77</sup> If there were any disputes, the IXC would be required to actually produce the LOA to the LEC.

## 2. Waiver Order

Shortly after the FCC released the *Allocation Order*, several carriers petitioned to clarify the letter of agency requirements.<sup>78</sup> AT&T, in particular, wanted to know whether a voice recording or other form of electronic signature could satisfy the requirement that IXCs maintain LOAs signed by their customers.<sup>79</sup> In addition, several parties expressed concern that end-users who make a verbal commitment over the phone are not always prompt in returning a signed LOA.

The FCC reiterated its opinion that IXCs *should* have signed LOAs on file because "[t]he potential for such error or abuse is diminished when an IXC obtains letters of agency."<sup>80</sup> However, upon reconsideration, the FCC weakened its stance and changed its position to allow IXCs *to certify* to the LEC that they either (a) have the LOA on file; or (b) have taken reasonable steps to obtain the signed letter of agency.<sup>81</sup>

As a result of these modifications, the FCC no longer required IXCs to submit the letter of agency to the LEC as confirmation of the requested change, nor were they required to have the LOA in their possession when notices were sent to the LECs to change over the customer's service. The FCC justified this change as "a reasonable accommodation with the IXCs' needs for flexibility in marketing."<sup>82</sup> The FCC's decision to "accommodate" the marketing needs of the long-distance industry heightened the potential for slamming.

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76. An LOA is a document, signed by the customer, which states that the customer has selected that carrier as its primary long-distance carrier. *In re Policies and Rules Concerning Unauthorized Changes of Customers' Long Distance Carriers, Notice of Proposed Rule Making*, 9 FCC Rcd. 6885, para. 1, 78 Rad. Reg. 2d (P & F) 227 (1994).

77. *Allocation Order*, 101 F.C.C. 2d 911, app. B, para. 11, 58 Rad. Reg. 2d (P & F) 337 (1985).

78. *In re Investigation of Access and Divestiture Related Tariffs, Memorandum Opinion and Order*, 101 F.C.C.2d 935 (1985) [hereinafter *Waiver Order*].

79. *Id.* para. 8.

80. *Id.* para. 21.

81. *Id.* para. 21.

82. *In re Investigation of Access and Divestiture Related Tariffs; Petitions for Reconsideration and Clarification of Allocation Plan Orders, Memorandum Opinion and Order*, 102 F.C.C.2d 503, para. 17, 60 Rad. Reg. 2d (P & F) 945 (1985).

#### IV. FCC RESPONSES TO SLAMMING

##### A. *Verification of PIC Changes*

Within six years of the FCC's decision to allow LECs to switch service for customers without a signed authorization, deceitful practices and accusations proliferated. In 1990, AT&T Vice President Merrill Tutton reported to the House Subcommittee on Government Information, Justice, and Agriculture that during the previous six months, more than 90,000 AT&T customers were victims of slamming.<sup>83</sup> AT&T also sued MCI, charging it with deceptive marketing practices, including slamming.<sup>84</sup> During this time, most of the IXCs used aggressive telemarketing practices to gain new customers in the battle for market share.<sup>85</sup>

The FCC revisited this issue in 1991 shortly after AT&T and MCI reached an out-of-court settlement in which they both agreed to propose to the Commission safeguards to protect consumers from slamming.<sup>86</sup> Although AT&T originally advocated a return to the stricter requirement whereby the IXC would be required to have the LOA in hand before submitting the change to the LEC, it also submitted a joint proposal with MCI. This proposal suggested verification alternatives, such as third-party confirmation, which would still allow easy use of telemarketing to gain new customers.<sup>87</sup>

The FCC rejected the stricter requirements in favor of the AT&T/MCI proposed IXC telemarketing verification methods.<sup>88</sup> Under this rule, IXCs that submit change orders on behalf of customers were required to institute one of four confirmation procedures: (1) obtain the letter of agency from the customer; (2) provide an "800" number for the customer to call to confirm the change; (3) obtain authorization through an independent third-party verifier; or (4) send, within three business days after customer's request for PIC change, confirmation materials, describing the terms of the

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83. Charles Mason, *AT&T, MCI Take Up 'Slamming' Dispute*, TELEPHONY, Oct. 22, 1990, at 14.

84. Lewyn, *supra* note 26, at 55.

85. During 1991, MCI reportedly made seven million telemarketing calls per month; AT&T reportedly made five million. Andrew Lipman, *Telemarketing Indicted in Slamming Inquiry*, TELEMARKETING, Feb. 1991, at 12.

86. *In re AT&T Petition for Rule Making, Notice of Proposed Rule Making*, 6 FCC Rcd. 1689, para. 4 (1991).

87. *Id.* at app. A (Confirmation Procedures).

88. *In re Policies and Rules Concerning Changing Long Distance Carriers, Report and Order*, 7 FCC Rcd. 1038, para. 6, 70 Rad. Reg. 2d (P & F) 321 (1991) [hereinafter *PIC Verification Order*].

service, and a postage-paid card that the customer can use to deny, cancel, or confirm the service order.<sup>89</sup>

In considering the alternatives between requiring the IXC to have a signed LOA on hand before notifying the LEC of the customer change or adopting these verification methods, the FCC sought to "benefit consumers without unreasonably burdening competition in the interexchange market."<sup>90</sup>

### *B. Separate or Severable LOA*

After these new verification rules were in place, the FCC continued to receive thousands of complaints regarding slamming. On its own motion, the FCC initiated a rulemaking in 1994 to review its current policies and propose changes to the current rules.<sup>91</sup> The stated reason for this action was "to protect consumers . . . and to ensure that consumers are in full control of their long-distance service choices."<sup>92</sup>

The primary complaint involved misleading LOAs. For example, many IXCs combined a contest entry form and a letter of agency into one document, potentially confusing customers. To combat this problem, the FCC proposed requiring that the LOA be a separate document without any "inducement" language. Further, the FCC proposed to require that the language of the LOA be clear, unambiguous, legible, and in a font size large enough to read.<sup>93</sup> Comments concerning this proposal ranged from statements by IXCs, who argued that the proposals were too broad and overreaching, to those by Congressmen and certain LECs, who argued the changes were not strict enough.<sup>94</sup>

The Commission chose to require that the LOA be a separate or severable document.<sup>95</sup> Although it recognized that this requirement would affect some of the marketing techniques used by the IXCs, it argued that this requirement was "narrowly tailored" to reduce incidences of unauthorized switches caused by consumer confusion. The FCC also carved out an exception to the "severable" rule by allowing the continued use of a negotiable instrument to serve as a letter of agency.

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89. *Id.* at app. B.

90. *Id.* para. 42.

91. *In re Policies and Rules Concerning Unauthorized Changes of Customers' Long Distance Carriers, Notice of Proposed Rule Making*, 9 FCC Rcd. 6885, para.1, 78 Rad. Reg. 2d (P & F) 227 (1994).

92. *Id.* para. 20.

93. *Id.* para. 2.

94. *LOA Order*, 10 FCC Rcd. 9560, para. 13, n.28, 78 Rad. Reg. 2d (P & F) 215 (1995).

95. *Id.* para. 22.



### C. Consumer Liability for Unauthorized Changes

#### 1. Charges for the Switch

The FCC has consistently maintained throughout its proceedings that after a consumer makes its initial selection of an IXC, charges will be assessed for subsequent changes.<sup>96</sup> Further, if a consumer challenges this charge by claiming that he did not authorize the change, the IXC must accept responsibility for any billing dispute if it is unable to produce a signed letter of agency.<sup>97</sup> The Commission reiterated this decision after adopting the PIC verification procedures.<sup>98</sup> Although the *PIC Verification Order* gave IXCs alternatives to obtaining a letter of agency for the sole purpose of verification, it did not remove the requirement that the IXC eventually obtain the signed letter of agency from the consumer.

#### 2. Charges for the Long-Distance Toll

In 1995, the Commission examined the issue of liability for the long-distance charges associated with the unauthorized changes and adopted a "make whole" approach whereby the consumer would be liable only for the amount he would have been charged by his authorized carrier.<sup>99</sup> Although some comments to the proposal suggested total remission of consumer liability for all toll charges from unauthorized IXCs, the Commission chose not to adopt this approach under the theory that the slammed customer still received a service, albeit an unauthorized one. The Commission did, however, recognize that some IXCs engaged in slamming would not be deterred unless all revenue was denied and stated that "if slamming continues unabated—perhaps through abuses in areas other than the use of the LOA—we may have to revisit this question at a later date."<sup>100</sup>

The 1996 Act forces the FCC to reexamine this issue by charging it with the creation of rules that require any telecommunications carrier that violates verification procedures to pay the customer's previous carrier "an

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96. *Allocation Order*, 101 F.C.C. 2d 911, App. B, para. 4, 58 Rad. Reg. 2d (P & F) 337 (1985).

97. *In re Illinois Citizens Utility Board Petition for Rule Making, Memorandum Opinion and Order*, 2 FCC Rcd. 1726, para. 20, 62 Rad. Reg. 2d 333 (1987).

98. *In re Policies and Rules Concerning Changing Long Distance Carriers Petitions for Reconsideration and Clarification, Order*, 8 FCC Rcd. 3215, para. 9, 72 Rad. Reg. 2d (P & F) 1081 (1993).

99. *LOA Order*, 10 FCC Rcd. 9560, para. 36, 78 Rad. Reg. 2d (P & F) 215.

100. *Id.* para. 37.

amount equal to all charges paid by such subscriber after such violation."<sup>101</sup>

#### D. Enforcement of the Rules

The Commission is authorized to assess a forfeiture of up to one hundred thousand dollars for each violation or each day of a continuing violation up to a statutory maximum of one million dollars for a single act or failure to act.<sup>102</sup> When assessing penalties, the Commission is required to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require."<sup>103</sup>

Although the FCC has received thousands of complaints regarding slamming, few IXC's have been penalized. In 1994, Cherry Communications entered a consent decree with the FCC and agreed to pledge a \$500,000 voluntary contribution to the U.S. Treasury.<sup>104</sup> Consumers from thirty states complained that Cherry had switched their PICs without authorization or had engaged in misleading and deceptive PIC change marketing practices.<sup>105</sup>

Oncor Communications also agreed to pay \$500,000, although the original assessed penalty was \$1,410,000,<sup>106</sup> and to enter into a consent decree to resolve charges that it had illegally switched ninety-four pay phones in New York owned by the Metropolitan Transportation Authority.<sup>107</sup>

On January 23, 1996, the FCC, for the first time, proposed fines against AT&T and MCI for switching consumers to their service without their approval.<sup>108</sup> Both AT&T and MCI have been accused of slamming since the early 1990s, and the FCC has just now proposed and enforced penalties against them.<sup>109</sup> MCI subsequently entered a consent decree with

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101. Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 101, §258(b), 110 Stat. 56, 77 (to be codified at 47 U.S.C. § 258).

102. 47 U.S.C. § 503(b)(2)(B) (1994).

103. *Id.* at § 503(b)(2)(D).

104. *In re Cherry Comm., Inc., Consent Decree*, 9 FCC Rcd. 2087, para. 9, 75 Rad. Reg. 2d (P & F) 268 (1994).

105. *Id.* para. 2.

106. *In re Operator Communications, Inc., Notice of Apparent Liability for Forfeiture*, 10 FCC Rcd. 5647, 77 Rad. Reg. 2d (P & F) 1205 (1995).

107. *FCC Actions*, COMMON CARRIER WK., Sept. 25, 1995.

108. *Common Carrier Bureau Finds Five Companies Apparently Liable for Forfeiture for Slamming*, Jan. 23, 1996, available in 1996 FCC LEXIS 219.

109. *FCC Proposes Fining MCI and AT&T for 'Slamming'*, WALL ST. J., Jan. 24, 1996, at B8.

the FCC, admitting no wrongdoing, and agreed to voluntarily pay \$30,000 to the U.S. Treasury.<sup>110</sup> In addition, MCI agreed to use a third party to verify residential and business change orders.<sup>111</sup>

### *E. Streamlining the Complaint Process*

In 1996, the FCC Common Carrier Bureau formed the Consumer Protection Branch to handle complaints and inquiries.<sup>112</sup> Chairman Hundt described the move as making the FCC the "Triple A" of the Information Highway, "to provide information to help consumers choose their routes and help them with problems once they are on the road."<sup>113</sup> Although this move helps to improve telephone access to the branch, which enables consumers to complain about slamming, it does little to actually deter slamming itself.

## V. SOLUTIONS TO THE PROBLEM

The FCC must reevaluate the effectiveness of its rules and propose new solutions to stop slamming. As the Commission looks at ways to solve this problem, it should remind itself of the premises of antitrust theory. The purpose of the antitrust laws "is to maintain free competition by ensuring that such competition is fair."<sup>114</sup> This Commission is more focused on encouraging competition in the market than it is on ensuring the fairness of such competition. To balance the equation, it must require and enforce fairness. IXC's should once again be required to have a signed letter of agency before notifying LECs to process a change order. In addition, the FCC must enforce this rule by punishing slammers severely enough to prevent them from ordering unauthorized changes.

### *A. Verification Procedures*

#### 1. Verification by the IXC

Under the current rules, an IXC can notify the LEC to change a customer's service if the IXC has initiated steps to obtain a signed

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110. *Common Carrier Bureau Adopts Consent Decree Agreement with MCI Resolving Notice of Apparent Liability for Forfeiture for Slamming*, June 21, 1996, 1996 FCC LEXIS 4595. See also *Excel, Heartline are Fined by FCC for 'Slamming,'* WALL ST. J., June 24, 1996, at A7.

111. *Id.*

112. *Common Carrier Action FCC Announces Consumer Protection Branch*, Jan. 23, 1996, available in 1996 FCC LEXIS 220 at \*1.

113. *Id.*

114. KINTNER, *supra* note 1, at 16.

LOA,<sup>115</sup> and followed one of the four required verification methods.<sup>116</sup> IXC's submit lists with thousands of names and numbers on them and then the LEC's process the switch. The problem with this system is that it allows changes to be made too easily, and the LEC has no way to verify the change before implementation. Slamming can occur due to error in typing the lists, error when implementing the change, or, the most deceitful type, IXC fraud by placing names on the list for which no procedures have been implemented and no authorization has been provided.

When the FCC first ruled on the procedures for implementing changes in customers' services, it adopted a system which allowed customers to affirmatively choose their carrier. In its order, the Commission concluded that this system would increase consumer awareness and give IXC's added incentive to offer competitive services. "The most important aspect of this plan is that customers *will be better able to exercise their right to choose a primary long distance carrier.*"<sup>117</sup> Further, the Commission required that any IXC submitting a list to the LEC must affirm to the LEC that it has the signed LOA in its possession. This rule was "designed to facilitate dispute resolution, to minimize consumer confusion, and to protect the LEC's from processing change orders for which no party is clearly responsible."<sup>118</sup>

If the FCC foresaw the potential for error in changes at such an early stage it should not have recanted a mere two months later. When the industry clamorously argued that this rule would stifle competition,<sup>119</sup> the FCC quickly caved in to industry pressure and granted the IXC's more freedom to change orders. This freedom is exactly what caused the problem of slamming, and if the FCC truly wants to protect fair competition, it will return to its original rule requiring that the IXC has in its possession a signed authorization letter from the customer before any change orders are sent to LEC's. To further prevent unauthorized changes, the FCC should also require that IXC's forward to the LEC a copy of the signed authorization. If the Commission requires this additional measure, only the most deceitful IXC's, those that would forge a signature, will be able to switch a customer in an unauthorized manner.

This requirement would once again be met with a great deal of opposition from the industry. However, under the current rules, IXC's are

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115. *Waiver Order*, 101 F.C.C.2d 935 (1985).

116. *PIC Verification Order*, 7 FCC Rcd. 1038, app. B, 70 Rad. Reg. 2d (P & F) 321 (1991).

117. *Allocation Order*, 101 F.C.C.2d 911, para. 38, 58 Rad. Reg. 2d (P & F) 337 (1985) (emphasis added).

118. *Waiver Order*, 101 FCC Rcd. 935, para. 9 (1985).

119. *Id.* para. 21.

still required to obtain the LOA, even though they are not required to have it on hand when they notify the LEC to switch the service. After the FCC implemented its verification procedures, it stated "[t]hese verification procedures were not intended to substitute for written authorization from customers as evidence in a PIC change dispute . . . IXCs must still obtain LOAs for use in resolving disputes regarding all changes in customer service."<sup>120</sup>

If the FCC requires the IXC to obtain the signed letter of agency before implementing a change order, the most drastic consequence is that the change process will be slowed down. Although the IXCs will argue that this will effectively prevent them from competing, this is simply not true. If a consumer agrees over the telephone to switch his service but then delays in returning a LOA, it is quite possible that the consumer changed his mind and does not want to implement the change. Instead of blaming the consumer's failure to return the LOA on a procedural requirement, the IXC should reevaluate its offer and make it more attractive so that the consumer does not hesitate to return the LOA and take immediate advantage of the better offer.

## 2. Verification by the LEC

One measure that several LECs have already voluntarily undertaken is to place a hold order on a customer's account. Under this plan, the customer informs the LEC that he does not want his service changed without his express permission. If the LEC gets a change order from the IXC for the customer's account, it will not implement the change without the customer's authorization.

In Chicago, Ameritech sent forms to its customers to prevent unauthorized changes, and in the first month, thousands responded to the offer.<sup>121</sup> AT&T, calling the plan "flagrantly anticompetitive," ironically responded by encouraging its customers to "freeze" their accounts to prevent them from getting slammed.<sup>122</sup>

Ameritech's measure, however, is currently under review by the Illinois Commerce Commission, which ruled that the mailing was

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120. *In re Policies and Rules Concerning Changing Long Distance Carriers Petitions for Reconsideration and Clarification*, Order, 8 FCC Rcd. 3215, para. 9, 72 Rad. Reg. 2d (P & F) 1081 (1993).

121. *Long Distance Switching Deterred*, CHI. TRIB., Jan. 24, 1996, at B3.

122. *AT&T Encourages 'Freezing' Accounts, Follows Ameritech*, WALL ST. J., April 4, 1996, at B8.

misleading and anti-competitive.<sup>123</sup> A final decision on this matter should be made by late 1996. If more LECs promote this offer by informing consumers of their ability to freeze their account, tempered by whatever requirements the Illinois Commerce Commission may suggest, the end result will be the same as requiring IXCs to have signed LOAs on hand before placing change orders. This measure will help consumers retain control of their long-distance carrier and require competitors to offer greater inducements to encourage consumers to switch.

### *B. Letter Of Agency Requirements*

The FCC ruled on letter of agency requirements in 1995 after a surge in deceitful practices by IXCs in which they commingled promotional materials with letters of agency. Most complaints involved instances where a charitable request or a contest entry form supposedly "authorized" a change.<sup>124</sup> Although the IXCs did indeed get a signature, which they argued fulfilled their authorization requirements, more often than not the customer had not actually "authorized" any change in telephone service because the IXC hid this vital information on the form.

In its latest rule, the FCC required that the LOA be a "separate or severable document."<sup>125</sup> It did, however, carve out an exception to this rule by allowing promotional checks to serve as a valid letter of agency since these have not been a source of consumer complaint.<sup>126</sup> This rule will help prevent some consumers from unknowingly authorizing changes to their service. However, it is clear that there are still companies willing to test the limits of this rule. For example, Telecam, a Houston-based corporation, is running a contest in which the entry form, with a perforation to meet the FCC requirements, is three inches high by seven and a half inches wide. Telecam claims that the perforation on the form makes it legal.<sup>127</sup>

If companies continue to push the limits of the law, the FCC should eliminate the "severable" option and require that the LOA be a separate rather than severable piece of paper. This will prevent deceptive marketers from "violating the spirit of the law."

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123. Jim Kirk, 'Slam' Service Slapped; Ameritech Offering Barred for 6 Mos., CHI. SUN-TIMES, April 4, 1996, at 43.

124. LOA Order, 10 FCC Rcd. 9560, para. 6, 78 Rad. Reg. 2d (P & F) 215 (1995).

125. *Id.* para. 4.

126. *Id.* para. 25.

127. Jerri Stroud, *State Says Contest is Misleading; Entry Could Mean Long-Distance Switch*, ST. LOUIS POST-DISPATCH, Jan. 13, 1996, at 6A.

### C. *Consumer Liability*

The 1996 Act recognizes that the FCC's "make whole" policy is not a sufficient deterrent to prevent slamming. Under the "make whole" policy, the slammer receives money for its "services," and therefore still makes a profit. Under the Act, the slammer is required to pay the customer's prior carrier whatever amount it charged for its unauthorized services. This, however, is still not a significant deterrent to prevent slamming. If the FCC wants to discourage slamming, it needs to do more than just reduce the profit margin. One solution is to require the consumer to pay his bill, adjusted to the amount his previous carrier would have charged. However, instead of allowing this money to go into the pockets of the slammer, this money could go into a fund to help enforce these laws. Under this plan, consumers would have no incentive to lie about changes to their service, and IXCs would have no incentive to make a switch. The details of such a system would have to be worked out between the FCC and the LECs.

An example of such a fund is the California Advocates' Trust Fund, established by the California Public Utilities Commission in 1982. The fund may be used to pay intervenor fees in "quasi-judicial" complaint cases where a private party has "made a direct, primary, and substantial contribution to the results of the case."<sup>128</sup> In *Lyon v. Matrix Telecom*, the complainants requested compensation from this fund for their successful litigation against Matrix Telecom for unlawfully switching their telephone service without their consent or knowledge. The court granted their request based on three factors. First, the Commission determined that the litigation raised an important societal issue—the right of consumers to be protected from unauthorized changes in their long distance service.<sup>129</sup> Second, a large number of people stood to benefit from the outcome of the litigation.<sup>130</sup> Third, the necessity for private enforcement placed a considerable burden on the complainants.<sup>131</sup>

### D. *Enforcement*

The FCC has substantial power to penalize slammers<sup>132</sup> and should not be timid in utilizing these powers. Slamming has been an issue for

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128. *Lyon v. Matrix Telecom*, 1995 Cal. PUC LEXIS 291, at \*2 (Mar. 22, 1995).

129. *Id.* at \*3.

130. *Id.* at \*4.

131. *Id.* at \*5.

132. The Commission has authority to assess a \$100,000 penalty for each day of a continuing violation up to \$1,000,000 for a single act or failure to act. 47 U.S.C. § 503(b)(2)(B) (1994).

many years, and the FCC has been too slow in responding. The FCC must penalize IXC's to deter this behavior. A \$30,000 "voluntary contribution" to the U.S. Treasury is not a significant deterrent when the corporation's profits significantly exceed the amount of the penalty. The FCC should assess larger fines to make a statement to the rest of the industry that it will not tolerate such deceptive behavior.

### CONCLUSION

To achieve competitive balance, the FCC must focus on two factors. First, it should continue to encourage competition in the long-distance market. Second, it must monitor this competition to ensure fairness. The FCC has, up to this point, focused more on the first factor to the detriment of the second. Although the FCC clearly considers fairness issues in its rulings and is concerned by this uncompetitive behavior among the IXC's, it has not acted with enough force to prevent the problem.

IXC's should once again be required to have a signed LOA on file before implementing a PIC change order. The FCC eliminated this requirement in order to grant the IXC's more flexibility; however, it is clear that this flexibility has been abused. Now that these companies have proved that they cannot self-regulate, this rule must be imposed and enforced by the FCC.

Although the IXC's will once again argue against such a requirement, it is clear that this is a balanced rule. Competition will be encouraged because IXC's will need to develop greater inducements to encourage consumers to return signed LOAs. In addition, competition will remain fair because this rule makes it more difficult for IXC's to switch customers without authorization. Last, this rule allows consumers to retain control over their long-distance service.

The FCC should not waste more time making complicated rules that are easy to manipulate. Requiring IXC's to have signed LOAs in their possession before ordering customer changes is a clear rule, is simple to enforce, is in the public interest, and will put an end to slamming.



